

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

JENNIFER L. MILLER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL J. ANDERSON, <i>et al.</i> ,)	Judge John R. Adams
)	
Defendants,)	Case No. 5:20-cv-01743-JRA
)	
and)	
)	
FIRSTENERGY CORP.,)	
)	
Nominal Defendant.)	

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
JOINT MOTION TO DISMISS WITH PREJUDICE**

On April 12, 2024, this Court entered an order, taking “judicial notice of the fact that the appeal has been completed,” and directing the parties to present any additional argument or information to the Court. Dkt. No. 454. Pursuant to that Order, the undersigned parties jointly submit this supplemental memorandum and respectfully request that the Court dismiss this Action with prejudice.¹

I. RELEVANT BACKGROUND

The allegations underlying this Action and the Action’s procedural background have been discussed in detail in prior submissions to the Court, including the Joint Motion to Dismiss with Prejudice filed on August 24, 2022. *See* Dkt. No. 353. This supplemental memorandum

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in the parties’ Joint Motion to Dismiss with Prejudice, Dkt. No. 353.

therefore sets forth only the background and additional developments responsive to the Court's April 12 Order and relevant to the relief sought by the parties.

On August 23, 2022, the U.S. District Court for the Southern District of Ohio granted final approval of the Settlement, dismissed the derivative action pending in the Southern District with prejudice, and entered judgment as to all claims and parties. Dkt. Nos. 353-1 (Final Approval Order) & 353-2 (Final Judgment). In the Final Approval Order, the Southern District overruled objections by Todd Augenbaum, the proposed intervenor here. Dkt. No. 353-1 at 16. Augenbaum then filed a motion to reconsider, which the Southern District denied on May 22, 2023. *Emps. Ret. Sys. of the City of St. Louis v. Jones*, No. 2:20-cv-04813 (S.D. Ohio) (the "Southern District Action"), Dkt. No. 205.

On June 16, 2023, Augenbaum appealed, arguing that the Southern District erred in approving the Settlement. *Emps. Ret. Sys. of the City of St. Louis v. Jones*, No. 23-3512 (6th Cir.) (the "Sixth Circuit Appeal"), Dkt. Nos. 1, 52. On September 29, 2023, this Court stayed the Action pending completion of the Sixth Circuit Appeal. Dkt. No. 451.

On February 16, 2024, the Sixth Circuit issued its decision affirming the judgment of the Southern District. Sixth Circuit Appeal, Dkt. No. 77-1 (the "Opinion and Judgment," attached as Appendix A hereto). It determined that "Augenbaum forfeited each of his appellate arguments by raising them for the first time in his motion for reconsideration or on appeal and has provided no justification for entertaining them despite the forfeiture." *Id.* at 6. The Sixth Circuit nevertheless addressed Augenbaum's objections and rejected each one, concluding that they were "without merit." *Id.* at 14. Among other things, the Sixth Circuit found that the first-to-file doctrine did not preclude the Southern District from considering and approving the Settlement; it

also concluded that the Settlement did not require separate approval proceedings in every court where the derivative cases were filed. *Id.* at 12–13.

II. ARGUMENT

In light of the Southern District’s Final Approval Order and Final Judgment, this Action should be dismissed with prejudice. The Sixth Circuit’s Opinion and Judgment affirming the Southern District’s decision further compels dismissal.

First, the Final Judgment, now affirmed by the Sixth Circuit, has *res judicata* effect. Each of the four elements for *res judicata* are indisputably satisfied here: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their “privies”; (3) an issue in the subsequent action that was litigated or that should have been litigated in the prior action; and (4) an identity of the causes of action. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). *See also* Dkt. No. 353-1 at 26 (providing a more detailed discussion of the application of the elements of *res judicata* to the Action).

The Southern District, indisputably a court of competent jurisdiction, entered Final Judgment dismissing all claims with prejudice, which is a final decision on the merits. *See* Dkt. No. 353-2, ¶ 7 (ordering that “[a]ll claims asserted in the Southern District Action are hereby dismissed with prejudice”); *Thompson v. Love’s Travel Stops & Country Stores, Inc.*, 748 F. App’x 6, 11 (6th Cir. 2018) (“A dismissal labeled ‘with prejudice’ signals a final judgment on the merits with preclusive effect.”). The Sixth Circuit has now affirmed that final judgment on the merits.

The other three elements are likewise met. The parties in this Action are nearly identical to those in the Southern District Action: both actions are derivative suits brought for the benefit of FirstEnergy by Plaintiffs as FirstEnergy stockholders, and both assert claims against virtually

the same defendants. *See* Dkt. No. 353 at 9. Both actions are premised on identical factual allegations stemming from the alleged bribery scandal involving former Speaker Householder and HB6 and present nearly identical claims on behalf of FirstEnergy. *See id.* at 9, 12; *see also* Opinion and Judgment at 1 (“Shareholders of FirstEnergy Corporation filed this derivative action against current and former FirstEnergy executives to mitigate losses from the Company’s role in the ‘HB6 Scandal’”).

Even Augenbaum does not dispute the *res judicata* effect. He has conceded that the Final Judgment has preclusive effect on the claims asserted in this Action and that, in light of the Final Approval Order, he and other shareholders cannot continue litigation of those claims. Southern District Action, Dkt. No. 181 at 13.

Because, as demonstrated above and in the Joint Motion to Dismiss, this Action is barred by the Final Judgment—which now has been affirmed by the Sixth Circuit—the Action must be dismissed with prejudice.²

Second, independent of *res judicata*, this Action should be dismissed with prejudice because the claims asserted in this Action are extinguished by the express terms of the court-approved Settlement. The Settlement’s releases encompass all claims asserted here. Dkt. No. 353-1 at 10-11; Dkt. No. 353-2, ¶¶ 9, 11. When the time to file a petition for certiorari expires on May 16, 2024, those releases will be effective by operation of the Settlement’s terms to fully

² Augenbaum’s objections to the Settlement also are barred by *res judicata*. All of his objections were presented to the Southern District and were adjudicated in the Final Approval Order, *see* Dkt. No. 353-1, and in the denial of Augenbaum’s motion for reconsideration, Southern District Action, Dkt. No. 205 at 8; *see also* Opinion and Judgment at 10–11 (noting that the Southern District considered Augenbaum’s objections, though belated, at the motion for reconsideration stage). The Sixth Circuit now also has concluded that Augenbaum’s objections are “without merit.” Opinion and Judgment at 14.

and finally extinguish all claims here.³ *See, e.g., Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1209 (6th Cir. 1992) (approving release of derivative claims, including unknown claims, over shareholder objection); Opinion and Judgment at 8–11, 14 (affirming approval of the Settlement and rejecting objection to description of release).

Third, because this Action is barred by *res judicata* and the claims are extinguished by the Settlement, there is no basis for the Court to address any other pending motion, all of which should therefore be denied as moot. The Court has not yet decided Augenbaum’s motion to intervene, with good reason—the approval of the Settlement and the Settlement itself render that motion futile and the other relief sought by Augenbaum moot. *See* Dkt. Nos. 359, 360, 361. Specifically, there is only one claim in Augenbaum’s proposed complaint-in-intervention—a claim against non-party Clearsulting LLC—that is even arguably not barred by *res judicata* or not within the scope of the Settlement’s releases; all other proposed claims are against the Defendants (*see* Dkt. No. 360 at 8 n.2) and are identical to those asserted in this Action, which the Court already found are “substantively identical” to the claims in the Southern District Action that have been dismissed with prejudice (*id.* at 8; *see also* Dkt. No. 117 at 1). Any potential claim against Clearsulting LLC should be pursued, if at all, in a separate action, and not in this Action, where all of the current claims are subject to dismissal with prejudice. Augenbaum’s motion, and all other pending mentions, should therefore be denied as moot and this Action should be dismissed with prejudice.

³ The releases become effective upon the “Effective Date,” Dkt. No. 353-2, ¶ 9, which, in relevant part now that the Sixth Circuit has affirmed, will be May 16, 2024, when the time to file a petition for a writ of certiorari expires (assuming a petition, if filed, would be denied). On April 18, 2024, counsel for Augenbaum advised that Augenbaum does not intend to file a petition for a writ of certiorari.

III. CONCLUSION

For the foregoing reasons and those set forth in the parties' Joint Motion to Dismiss with Prejudice, the parties request that the Court dismiss this Action with prejudice and that all other pending motions be denied as moot.

Dated: April 25, 2024

Respectfully submitted,

/s/ Susan Reagan Gittes (with permission)
Maeve O'Connor (admitted *pro hac vice*)
John Gleeson (admitted *pro hac vice*)
Susan Reagan Gittes (admitted *pro hac vice*)
DEBEVOISE & PLIMPTON, LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Email: mloconnor@debevoise.com
Email: jgleeson@debevoise.com
Email: srgittes@debevoise.com

Kerin Lyn Kaminski (0013522)
Karen L. Giffen (0042663)
Kathleen A. Nitschke (0073397)
GIFFEN & KAMINSKI, LLC
1300 East Ninth Street, Suite 1600
Cleveland, OH 44114
Telephone: (216) 621-5161
Facsimile: (216) 621-2399
kkaminski@thinkgk.com
kgiffen@thinkgk.com
knitschke@thinkgk.com

*Attorneys for the Special Litigation
Committee of the Board of Directors of
Nominal Defendant FirstEnergy Corp.*

/s/ John F. McCaffrey (with permission)
John F. McCaffrey (0039486)
John A. Favret (0080427)
Hannah M. Smith (0090870)
TUCKER ELLIS LLP
950 Main Avenue - Suite 1100
Cleveland, OH 44113

/s/ Geoffrey J. Ritts
Geoffrey J. Ritts (0062603)
Robert S. Faxon (0059678)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
Email: gtritts@jonesday.com
Email: rfaxon@jonesday.com

Marjorie P. Duffy (0083452)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
Email: mpduffy@jonesday.com

*Attorneys for Defendants Michael J.
Anderson, Steven J. Demetriou, Julia L.
Johnson, Donald T. Misheff, Thomas N.
Mitchell, James F. O'Neil, III, Christopher D.
Pappas, Sandra Pianalto, Luis A. Reyes,
Leslie M. Turner, Steven E. Strah, and K. Jon
Taylor*

/s/ Douglas L. Shively (with permission)
Daniel R. Warren (0054595)
Carole S. Rendon (0070345)
Douglas L. Shively (0094065)
Jeremy S. Dunnaback (0098129)
Baker & Hostetler LLP
Key Tower, 127 Public Square, Suite 2000
Cleveland, OH 44114

Telephone: (216) 592-5000
Facsimile: (216) 592-5009
Email: john.mccaffrey@tuckerellis.com
Email: john.favret@tuckerellis.com
Email: hannah.smith@tuckerellis.com

Attorneys for Defendant Michael J. Dowling

/s/ John C. Fairweather (with permission)

John C. Fairweather (0018216)
Lisa S. DelGrosso (0064938)
BROUSE McDOWELL
388 South Main Street, Suite 500
Akron, OH 44311
Telephone: (330) 535-5711
Facsimile: (330) 253-8601
Email: jfairweather@brouse.com
Email: ldelgrosso@brouse.com

Stephen S. Scholes (admitted *pro hac vice*)
Paul M.G. Helms (admitted *pro hac vice*)
MCDERMOTT WILL & EMERY LLP
444 West Lake Street
Chicago, IL 60606-0029
Telephone: (312) 372-2000
Facsimile: (312) 984-7700
Email: sscholes@mwe.com
Email: phelms@mwe.com

Attorneys for Defendant Robert P. Reffner

/s/ Derek P. Hartman (with permission)

Samir B. Dahman (0082647)
KOHMAN JACKSON & KRANTZ LLP
10 West Broad Street, Suite 2500
Columbus, OH 43215
Telephone: (614) 427-5750
Email: sbd@kjk.com

Derek P. Hartman (0087869)
KOHMAN JACKSON & KRANTZ LLP
1375 East 9th Street
One Cleveland Center
29th Floor
Cleveland, OH 44114
Telephone: (216) 696-8700

Telephone: (216) 621-0200
Facsimile: (216) 696-0740
Email: crendon@bakerlaw.com
Email: dshively@bakerlaw.com
Email: dwarren@bakerlaw.com
Email: jdunnaback@bakerlaw.com

George A. Stamboulidis (admitted *pro hac vice*)

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4211
Facsimile: (212) 589-4201
Email: gstamboulidis@bakerlaw.com

Albert G. Lin (0076888)
Baker & Hostetler LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
Email: alin@bakerlaw.com

Attorneys for Defendant Charles E. Jones

/s/ Douglas M. Mansfield (with permission)

Douglas M. Mansfield (0063443)
Lape Mansfield Nakasian & Gibson, LLC
9980 Brewster Lane, Suite 150
Powell, OH 43065
Telephone: (614) 763-2316
Facsimile: (614) 467-3704
Email: dmansfield@lmng-law.com

Michael L. Kichline (admitted *pro hac vice*)
Laura H. McNally (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
2222 Market Street
Philadelphia, PA 19103-3007
Telephone: (215) 963-5000
Facsimile: (215) 963-5001
Email: michael.kichline@morganlewis.com
Email: laura.mcnally@morganlewis.com

Attorneys for Defendant Dennis M. Chack

Facsimile: (216) 621-6536

Email: dph@kjk.com

David L. Axelrod (admitted *pro hac vice*)

Emilia McKee Vassallo (admitted *pro hac vice*)

BALLARD SPAHR LLP

1735 Market Street, 51st Floor

Philadelphia, PA 19103-7599

Telephone: (215) 665-8500

Facsimile: (215) 864-8999

Email: axelrodd@ballardspahr.com

Email: mckeevassallo@ballardspahr.com

Attorneys for Defendant James F. Pearson

/s/ Marcella L. Lape (with permission)

Marcella L. Lape (0077803)

Gail Lee (admitted *pro hac vice*)

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP

155 N. Wacker Dr. Suite 2700

Chicago, IL 60606

Telephone: (312) 407-0700

Facsimile: (312) 407-0411

Email: marcie.lape@skadden.com

Email: gail.lee@skadden.com

*Attorneys for Defendant Ebony Yeboah-
Amankwah*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on April 25, 2024. Notice of this filing will be sent to all electronically registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Marjorie P. Duffy

Marjorie P. Duffy (0083452)

One of the Attorneys for Defendants Michael J. Anderson, Steven J. Demetriou, Julia L. Johnson, Donald T. Misheff, Thomas N. Mitchell, James F. O'Neil, III, Christopher D. Pappas, Sandra Pianalto, Luis A. Reyes, Leslie M. Turner, Steven E. Strah, and K. Jon Taylor